Filed 1/3/19 P. v. Padilla CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY PADILLA,

Defendant and Appellant.

F073817

(Super. Ct. No. BF156506A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Brian M. McNamara, Judge.

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Marcia A. Fay, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

The People charged defendant Anthony Padilla with first degree murder after he stabbed Oscar Simental and Simental died from the wound. The jury convicted defendant of second degree murder. The court sentenced defendant to a minimum term

of 30 years to a maximum term of life imprisonment, enhanced by seven additional years: one year for personal use of a deadly weapon, five years for a prior serious felony, and one year for a prior prison term.

On appeal, defendant argues: (1) because he was only charged with first degree murder, his conviction for second degree murder should be vacated; (2) the trial court abused its discretion in permitting witnesses to appear in shackles; (3) the trial court abused its discretion by sustaining the prosecutor's "nonresponsive" objection to a portion of defendant's testimony; (4) the trial court committed reversible error in including the entirety of CALCRIM No. 358 in the jury instructions; (5) the trial court committed reversible error in rejecting defendant's request to include a jury instruction that "mere words can be sufficient as a basis for provocation"; and (6) the prior prison sentencing enhancement should be vacated because defendant did not admit a separate prior conviction to support it.[1]

The People concede, and we sustain, defendant's sixth issue and modify defendant's sentence by vacating the prior prison sentencing enhancement. Finding no other reversible error, we affirm the remainder of the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and his cousin Joshua Soto were at the Play Fair Market in Bakersfield in August 2014 when they were approached by Oscar Simental, who was high on methamphetamine. Simental was speaking aggressively and accused them of robbing his house in Delano. According to Soto and defendant, when they walked outside, Simental pushed defendant repeatedly and they engaged in a verbal confrontation. Defendant then stabbed Simental, and Simental died from the resulting wound. The People charged

[1] In his opening brief, defendant also alleged the sentencing enhancements should be vacated because the trial court failed to advise him of the consequences of admitting his prior convictions. However, in his reply brief, defendant withdrew this issue and conceded that it was forfeited.

defendant with willfully, unlawfully, deliberately, and with premeditation and malice aforethought murdering Simental, in violation of Penal Code section 187, subdivision (a), a felony.

Multiple witnesses testified at trial. The prosecution called Soto as a witness. Soto testified when he and defendant entered the Play Fair Market on the day of the stabbing, they saw Simental, who "was mumbling something under his breath" and looked "like he was like really drugged out." Simental approached Soto with his hands in front of him, ready to push. Defendant told Simental to back away. Simental left the store and waited outside with two other men.

Soto testified he and defendant then went outside. Simental and the other two men approached and Soto felt threatened. Simental began "pushing up on" defendant. Defendant told Simental to "back off" but Simental kept pushing him. Simental continued acting aggressively and exchanged profanity with defendant. Simental pushed defendant approximately four times, and the last shove caused defendant to stumble. Defendant then took out a pocketknife. Simental and the two men with him did not have visible weapons. When defendant pulled out his knife, Simental accused defendant of robbing his house in Delano. Defendant stabbed Simental once in the chest, after which the five of them—defendant, Soto, Simental, and the two men with Simental—dispersed. According to Soto, Simental was walking backwards, away from defendant when defendant stabbed him. Soto testified he and defendant went to Soto's house but eventually they walked back towards the market. On the way, they passed Simental's body lying on the ground. Soto told police defendant then approached Simental's body and kicked it multiple times in the torso and face; but at trial, Soto denied seeing defendant kick the body. The People introduced the audio and video recording of Soto's statement to police and the related transcript. Soto testified that basically his entire statement to the officers was a lie.

The prosecutor also introduced surveillance footage depicting the inside of the Play Fair Market and Soto identified Simental, himself, and defendant on the recording. He explained the point in the recording when Simental was pushing him and accusing him of robbing his house; then he and defendant left. Soto later identified the moment when defendant stabbed Simental.

Defendant also testified he and Soto went to the Play Fair Market in August 2014. According to defendant, they saw Simental acting strangely and aggressively. Simental was with two other men and he was pacing back and forth, talking under his breath, and gesturing towards defendant and Soto before walking out of the store. When defendant and Soto left the market, Simental and the other two men were outside. Simental "started getting aggressive" and pushed defendant, saying he knew defendant "was the one that robbed his house in Delano." Defendant denied hitting or swinging at Simental while Simental was pushing him. Instead, defendant "kept telling [Simental] to back off and back away," but Simental "kept coming forward and getting more aggressive." Simental "started making threats," saying he was going to come back and kill defendant. Defendant testified he was scared for his safety; he had been "jumped before," stabbed six times, and has a shoulder injury that makes it difficult for him to fight.

Defendant admitted that, after Simental pushed him again and Simental was backing away, he stabbed Simental one time. Defendant pursued Simental for a few more steps, but he did not attempt to stab him again. Both defendant and Simental then walked away. Defendant testified he did not intend to kill Simental and he did not realize he had hit Simental in the chest. Defendant also testified he was once a member of the Southside Bakers gang, but he dropped out. The People introduced a recording and the related transcript of defendant's out-of-court interview with police, conducted after the incident.

Dr. Yulai Wang, the forensic pathologist who conducted an autopsy of Simental's body, testified the stab wound to Simental's chest caused his death.

N.D., also known as N.G.,[2] testified on behalf of the defense that, on the date of the stabbing, she encountered Simental and the two men he was with near the Play Fair market. N.G. explained the men were harassing her and one of them pulled her wig. She testified she did not see defendant stab anyone and defendant did not see the three men harassing her. She admitted, however, that she had told the public defender's investigator that she saw defendant fight the three men, and that defendant had pushed by her to defend her and he appeared to punch one of the men who was reaching for his waistband. She conceded these statements were false.

After the close of evidence, the jury convicted defendant of second degree murder. The court sentenced defendant to a minimum term of 30 years to a maximum term of life imprisonment, enhanced by seven additional years: one year for personal use of a deadly weapon, five years for a prior serious felony, and one year for a prior prison term. Defendant appeals.

DISCUSSION

I. Second Degree Murder Conviction

Defendant first contends his conviction for second degree murder should be vacated because the information only charged him with first degree murder.

A. Procedural History

Before the trial court submitted its instructions to the jury, defense counsel objected to the inclusion of a jury instruction on second degree murder:

> "It was the People's theory that this was a premeditated and deliberate act by [defendant]. The defense here is heat of passion, imperfect self-defense, neither of which get the people to second degree murder, I believe [*sic*], allows the jury to compromise, focusing on the issues put before the theories of each party …."

The prosecution responded:

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[2]Based on this witness's preference, we will refer to her as N.G.

> "Although that very well could be the theory that this is a first degree murder, I think that the jury … could determine that this was indeed an implied malice murder that was not done because of a provocation or an imperfect belief in self-defense, and therefore, I ask for the lesser included offense, second-degree murder."

The trial court overruled defense counsel's objection "based on the totality of the evidence." It concluded "the jury can take that evidence and certainly work through it," and there was "potentially enough to support first, second, or voluntary, depending on how the jury … sees it at the time."

B. Standard of Review and Applicable Law

Section 1159 of the Penal Code expressly provides: "The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is *necessarily included* in that with which he is charged, or of an attempt to commit the offense." (Italics added.) The California Supreme Court has explained this is because "[w]hen an accusatory pleading alleges a particular offense, it thereby demonstrates the prosecution's intent to prove all the elements of any lesser necessarily included offense. Hence, the stated charge notifies the defendant, for due process purposes, that he must also be prepared to defend against any lesser offense necessarily included therein, even if the lesser offense is not expressly set forth in the indictment or information. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 118.)

"Consistent with these principles, California decisions have held for decades that even absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*People v. Birks*, *supra*, 19 Cal.4th at p. 118; see *People v. Breverman* (1998) 19 Cal.4th 142, 162.) The sua sponte duty to instruct is designed to protect not only a defendant's "'constitutional right to have the jury determine every material issue presented by the evidence'" but also "'"the broader interest of safeguarding the jury's function of ascertaining the truth."'" (*People v. Cole*

(2004) 33 Cal.4th 1158, 1215.) The duty extends to every lesser included offense supported by substantial evidence; it is not satisfied "when the court instructs [solely] on the theory of that offense most consistent with the evidence and the line of defense pursued at trial." (*People v. Breverman, supra*, at p. 153.) "'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could … conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*Id.* at p. 162.) Instructions on lesser included offenses should be given "when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged." (*Id.* at p. 154.)

A particular offense is considered a "lesser included offense," and therefore subject to the duty, if it satisfies one of two tests. (See *People v. Reed* (2006) 38 Cal.4th 1224, 1227–1228.) The "elements" test is satisfied if the statutory elements of the greater offense include all the elements of the lesser, so that the greater cannot be committed without committing the lesser; the "accusatory pleading" test is satisfied if the facts actually alleged in the accusatory pleading include all the elements of the lesser offense, such that the greater offense charged cannot be committed without committing the lesser offense. (*Ibid.*)

C. Analysis

Defendant argues the court lacked jurisdiction to convict him of second degree murder which was """"neither charged nor necessarily included in the alleged crime""" and that the charge "not only *did not* warn the defendant, but by negative implication it *excluded* second degree murder by specifying the crime was committed solely in the manner specified by the first degree provisions of Penal Code section 189." Defendant relies upon *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234 (*Sheppard*) in support of his argument.

In *Sheppard*, the charge listed one count of murder under Penal Code section 187. (See *Sheppard*, *supra*, 909 F.2d at p. 1235.) The prosecution did not charge or raise a felony-murder theory of guilt until the morning of closing argument, after the parties had submitted and argued their requested jury instructions to the court and the jury instructions were settled. (See *id.* at pp. 1235–1236.) Based on the circumstances, the Ninth Circuit concluded the defendant did not receive adequate notice of the felony-murder theory, premised on an uncharged robbery. (*Ibid.*)

Sheppard is factually distinguishable and, moreover, California courts have concluded it is inconsistent with California Supreme Court authority. (E.g., *People v. Scott* (1991) 229 Cal.App.3d 707, 717 ["*Sheppard* cannot be squared with binding California Supreme Court authority"]; *People v. Crawford* (1990) 224 Cal.App.3d 1, 8 [*Sheppard* is "difficult to square" with the California Supreme Court's ruling in *People v. Murtishaw* (1981) 29 Cal.3d 733].) Here, the accusatory pleading charged defendant with willfully, unlawfully, deliberately, and with premeditation and malice aforethought murdering Simental. Second degree murder is "an unpremeditated killing with malice aforethought." (*People v. Seaton* (2001) 26 Cal.4th 598, 672.) It is well-established that second degree murder is a lesser included offense of first degree murder. (See, e.g., *People v. Gonzalez* (2018) 5 Cal.5th 186, 197.)

"Under the accusatory pleading test, the allegation of malice murder with deliberation and premeditation on its face gave rise to possible lesser included offenses of second degree murder, voluntary manslaughter, and involuntary manslaughter." (*People v. Campbell* (2015) 233 Cal.App.4th 148, 159–160.) Thus, the charge here notified defendant, for due process purposes, that he must also be prepared to defend against any lesser offense necessarily included therein, including second degree murder, even if the lesser offense was not expressly set forth in the indictment or information. (Accord, *People v. Birks*, *supra*, 19 Cal.4th at p. 118 ["When an accusatory pleading alleges a particular offense, it thereby demonstrates the prosecution's intent to prove all the

elements of any lesser necessarily included offense. Hence, the stated charge notifies the defendant, for due process purposes, that he must also be prepared to defend against any lesser offense necessarily included therein, even if the lesser offense is not expressly set forth in the indictment or information"]; *People v. Lohbauer* (1981) 29 Cal.3d 364, 369 ["[E]ven when the charge does not so specify, the requisite notice is nonetheless afforded if the lesser offense is 'necessarily included' within the statutory definition of the charged offense; in such event conviction of the included offense is expressly authorized"].)

Additionally, the trial court had a duty, even without a request by any party, to instruct the jury on second degree murder if there was substantial evidence defendant was guilty of this lesser included offense. (See *People v. Birks*, *supra*, 19 Cal.4th at pp. 118–119; *People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) Based on the evidence presented at trial regarding the events leading up to the stabbing, the court did not err in concluding there was substantial evidence to support a conclusion the murder was not deliberate and premeditated and thus, less than first degree murder. Specifically, the evidence reflects defendant stabbed Simental one time, during an altercation, and he testified he did not intend to kill Simental nor realize that he had hit Simental in the chest. Accordingly, the court did not err in instructing the jury on second degree murder and defendant was properly convicted of this lesser included offense. (E.g., *People v. Campbell*, *supra*, 233 Cal.App.4th at p. 162 ["The accusatory pleading in our case alleged a malice murder with deliberation and premeditation. While the accusation permits the prosecution to pursue a theory of first degree felony murder, it nonetheless gives rise to the trial court's sua sponte duty to instruct on lesser crimes of malice murder with premeditation and deliberation when warranted by the evidence"]; *People v. Anderson* (2006) 141 Cal.App.4th 430, 445 ["Because second degree murder and voluntary manslaughter are lesser included offenses of the offense charged against defendant in the amended information, defendant was on notice that she might be convicted of that crime or any of

its lesser included offenses—and, by the same token, that she could anticipate instructions on these lesser offenses if they were supported by substantial evidence"].)

We reject defendant's first contention.

II. Shackling Witnesses

Defendant next contends the trial court committed reversible error in permitting two witnesses to appear in shackles and handcuffs when they took the stand.

A. Relevant Procedural History

1. Soto testifies in shackles

Soto, who was called by the prosecution, was incarcerated in a maximum security jail at the time of trial. Before Soto testified, the court noted (outside of the presence of the jury): "[T]he jail has concerns that's [*sic*] been transferred to the court through where they placed him." Accordingly, the court decided there was a "manifest need" for the restraints and held that Soto would remain in shackles.

When the jurors returned, the court instructed them: "Do not consider for any reason at all the fact that the witness is in handcuffs and shackles. It's the Sheriff's department policy to have inmates in handcuffs and shackles while in court proceedings. Do not let this fact influence how you evaluate the testimony of this witness. Do not discuss this fact during your deliberations or let it influence your decision in any way." Soto took the stand and, during direct examination, the prosecutor noted that he was "obviously in custody."

2. N.G. also testifies in shackles

At trial, N.G.'s counsel asked the court to have her handcuffs removed before she testified because she was only "in custody because of the civil warrant that was issued for [her] to appear … to testify." Defense counsel and the prosecution both submitted the issue without further comment or objection. The court denied the request stating that it

believed there was a "manifest need" for the handcuffs because N.G. was "very upset" about being there.

As with Soto, when the jurors returned, the court instructed them: "[D]o not consider for any reason at all the fact that the witness is in handcuffs and shackles. It's the Lerdo [department]'s policy to have inmates in handcuffs and shackles while in court proceedings. Do not let this fact influence how you evaluate the testimony of this witness. Do not discuss this factor in your deliberations or let it influence your decision in any way."

3. Jury instruction regarding shackled witnesses

Before releasing the jury to deliberate, the trial court again noted that when Soto and N.G. testified, "they were in custody." The court instructed the jury: "Do not speculate about the reasons. The fact that a witness is in custody does not by itself make a witness more or less believable. Evaluate the witness's testimony according to the instructions I have given you."

B. Standard of Review and Applicable Law

The California Supreme Court has concluded "imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*People v. Duran* (1976) 16 Cal.3d 282, 291.) It held this rule to be "applicable to the shackling of defendants and *defense witnesses*, since the considerations supporting use of physical restraints are similar in each instance." (*Id.* at p. 288, fn. 4, italics added.) But the *Duran* court noted the prejudicial effect of shackling defense witnesses is less consequential than that suffered if the defendant is personally restrained. (*Ibid.*; see *People v. Ceniceros* (1994) 26 Cal.App.4th 266, 279.) It relied upon *Kennedy v. Cardwell* (6th Cir. 1973) 487 F.2d 101, in which the federal appellate court wrote: "The decision whether to shackle witnesses is left to the sound discretion of the trial judge. The reason underlying the rule

is the inherent prejudice to the defendant since it is likely the jury will suspect the witness's credibility. The prejudice factor toward the defendant, although much less than the situation where the defendant is shackled, provides a valid point of comparison even though *the shackled witness cases do not directly affect the presumption of innocence*." (*Id.* at p. 105, fn. 5, italics added; see *People v. Duran*, *supra*, at p. 288, fn. 4; *People v. Ceniceros*, *supra*, at pp. 278–279.)

In *Ceniceros*, the parties agreed the shackling of two defense witnesses was erroneous because the court failed to "'demonstrate a manifest need to shackle these witnesses.'" (*People v. Ceniceros*, *supra*, 26 Cal.App.4th at p. 277.) In evaluating whether any resulting error was harmless, our court noted: "[S]hackling a witness does not directly affect the presumption of a defendant's innocence and weighs little in the assessment of his or her credibility." (*Id.* at p. 279.) "Moreover, improper restraint of a witness does not affect the defendant's decision to take the stand, impede his ability to confer with counsel or otherwise significantly affect trial strategy. For these reasons, … the erroneous shackling of a defense witness under the circumstances presented here does not result in the deprivation of a specific federal constitutional right or so impair the trial process that it resulted in a deprivation of due process. Therefore, the effect of this error must be evaluated under the *Watson* standard." (*Id.* at p. 280.) Under that standard, the reviewing court must believe "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The *Ceniceros* court concluded "other evidence … as well as an admonition given to the jury by the court, provide[d] ample reason to conclude the error was harmless." (*Id.* at p. 280.)

C. Analysis

Defendant argues: "The defense was resting in large part on the testimony of [Soto and N.G.] to show that the true aggressor was not the defendant, and that his

actions were the result of strong provocation and that when he stumbled from being pushed the last time, it was a continuation of an increasingly serious assault" but "the defense evidence was shrouded by the fact its witnesses were untrustworthy for the juror's own eyes saw that judgment had been made and … people are affected by what they can plainly see far more than by what they are incompletely told."

First, "[i]t is settled that the use of physical restraints in the trial court cannot be challenged for the first time on appeal." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583.) Defendant failed to object to Soto or N.G. appearing in shackles at trial. He argues, however, his failure to object did not waive the issue because any objection would have been futile. He contends "[a]n objection would not have had any function other than to demonstrate that the objector was being obstreperous. The court had ruled." But, contrary to defendant's argument, he had an opportunity to object before the court had ruled, and he could have raised below his objection regarding the alleged effect the shackling of these witnesses had on his defense. This argument, raised for the first time on appeal, was not duplicative of that raised by N.G.'s counsel and would have been the only stated objection to Soto appearing in shackles. Thus, defendant's "failure to object and make a record below waives the claim here." (*People v. Tuilaepa, supra,* at p. 583; see *People v. Fisher* (2006) 136 Cal.App.4th 76, 79 ["Any error was waived because appellant did not object to wearing a leg restraint"].)

Irrespective, the trial court concluded there was a manifest need for these witnesses to appear in shackles.[3] To the extent that decision was erroneous, it did not result in the deprivation of a specific federal constitutional right or so impair the trial process that it resulted in a deprivation of due process. Therefore, the effect of this error

[3]Soto was called by the prosecution as opposed to the defense. Thus, the considerations underlying the *Duran* rule—prohibiting imposition of physical restraints on defendants or defense witnesses in the absence of a record showing of violence or a threat of violence or other nonconforming conduct—arguably do not even apply to Soto. (See *People v. Duran, supra,* 16 Cal.3d at pp. 288, fn. 4, 292.)

must be evaluated under the *Watson* standard—whether it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. (*People v. Ceniceros, supra,* 26 Cal.App.4th at pp. 278–280.) Applying this standard, we cannot conclude defendant was prejudiced.

In *People v. Valenzuela* (1984) 151 Cal.App.3d 180, the court identified two inferences relating to the witness's credibility that the jury could draw from the witness being shackled. First, knowledge that a witness was incarcerated might permit an inference of diminished credibility. (*Id.* at p. 194.) Second, "the presence of shackles permits the inference that the witness is dangerous and has probably engaged in violent conduct in the past." (*Id.* at pp. 194–195.)

We cannot conclude any inference of diminished credibility or the dangerousness of the witnesses drawn from the use of shackles probably affected the verdict. Here, both Soto's and N.G.'s credibility were already called into question based on their prior inconsistent statements. In fact, defendant's own counsel argued Soto's credibility was "questionable, at best." She highlighted Soto's inconsistent statement to police in which he stated defendant kicked Simental when Simental was lying on the ground. Soto himself testified his entire statement to police was basically a lie. Similarly, N.G. admitted she repeatedly lied to the investigator about witnessing the crime. She also did not witness the stabbing; thus, her testimony was not critical to the verdict. Additionally, Soto testified he was in custody for failure to appear, thereby dispelling any inference that he was incarcerated for violent conduct.

Moreover, the trial court admonished the jurors they were not to consider the presence of shackles in assessing the credibility of a witness and not to discuss the fact the witnesses were handcuffed in their deliberations. The jury is presumed to have followed the directions of the court and obeyed the law. (See *People v. Ceniceros, supra*, 26 Cal.App.4th at p. 281; see also *People v. Fauber* (1992) 2 Cal.4th 792, 823.)

Finally, the evidence against defendant was strong—the uncontroverted evidence established Simental was backing away from defendant when defendant stabbed him, and the stab wound caused Simental's death.

Thus, even assuming arguendo the trial court erred in permitting these witnesses to appear in shackles, based on the other challenges to the witnesses' credibility, the jury's knowledge that Soto was not in jail for a violent crime and that N.G. was not an eyewitness, the jury instruction directing the jury not to consider the witnesses' shackles, and the strength of the evidence inculpating defendant, we cannot conclude it is reasonably probable that a result more favorable to defendant would have been reached if these witnesses had appeared unrestrained.

We reject defendant's second contention.

III. Striking of Defendant's Testimony

Defendant next contends the trial court erred in excluding his testimony in response to the prosecutor's question to him during cross-examination: "You could have just showed [the knife] to [Simental]. He was backing away when you stabbed him?" Defendant replied, "He was so high he didn't even know what was really going on. He was—" The prosecutor objected to defendant's response as "nonresponsive" and moved to strike the response. The court sustained the prosecutor's objection and instructed the jury to disregard defendant's response "as to the victim's state of mind."

"A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party." (Evid. Code, § 766.) Defendant's comment about Simental's state of mind was nonresponsive to the question about whether he could have just shown the knife to Simental and whether Simental was backing up when he stabbed him. Accordingly, the trial court did not err in striking his answer.

We reject defendant's third contention.

IV. CALCRIM No. 358

Defendant next argues the trial court prejudicially erred in including the cautionary portion of CALCRIM No. 358 in the jury instructions.

A. Relevant Factual Background

The court provided CALCRIM No. 358, which instructs the jury: "You have heard evidence that the defendant made oral or written statements before the trial. You must decide whether the defendant made any of these statements in whole or in part. If you decide that defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements. Consider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded." The record does not reflect which party, if any, requested the instruction or whether it was given sua sponte.

The People charged defendant with committing the murder for the benefit of, at the direction of, or in association with a criminal street gang and with the specific intent to promote, further or assist in criminal conduct by gang members, within the meaning of Penal Code section 186.22, subdivision (b)(1). During her closing argument, defense counsel expressly cited the cautionary instruction, arguing:

> "Deputy Almanza testified that [defendant] said he was good [with the gang] on the street … [a]nd when you look at the jury instructions, you are going to see an instruction … that tells, [*sic*] you statements made out-of-court by the defendant, unless they are recorded or written, you should view with caution. [¶] [Defendant] told you, I didn't say that."

Defense counsel then referenced defendant's recorded statement to police, arguing, "More importantly, I pointed to the video where [defendant]'s being interviewed for hours, where he is talking freely with Rutledge and Sargeant [*sic*] Trevino, and he tells them, I'm a drop out, I'm in danger. During that whole two-hour conversation, never

once does he say that, I'm good on the streets." She encouraged the jury: "See it for yourself." The jury ultimately found the gang enhancement not true.

B. Standard of Review and Applicable Law

The purpose of CALCRIM No. 358 is to aid the jury in evaluating whether the defendant actually made an out-of-court statement. (See *People v. Diaz* (2015) 60 Cal.4th 1176, 1184.) In *Diaz*, the California Supreme Court noted there was "no conflict between the cautionary instruction and the requirement of proof beyond a reasonable doubt." (*Ibid*.) The *Diaz* court explained the cautionary instruction and the reasonable doubt instruction "serve distinct purposes and aid the jury in different ways." (*Id*. at p. 1188.) "The reasonable doubt instruction informs the jury that it must find the facts required for conviction to be proved with the specified level of certainty before it may convict the defendant." (*Ibid*.) "The cautionary instruction, on the other hand, advises jurors that in deciding whether to believe a witness's testimony about the defendant's statements, they must exercise particular caution." (*Ibid*.) "The two instructions, together, inform the jury that it must determine whether each of the elements of the crime has been proved beyond a reasonable doubt, and that in making that determination it must exercise special caution in considering one particular type of evidence." (*Ibid*.)

C. Analysis

For the first time on appeal, defendant challenges the cautionary portion of CALCRIM No. 358 that states: "Consider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded." He argues this part of the instruction "carves out an exemption for recorded statements, essentially telling jurors that defendant['s] statements [to police] … can simply be accepted as proof of guilt without the same care as would be given other statements." Though his counsel failed to object below, defendant argues the issue is

preserved for appeal because it affected his substantial rights or, alternatively, his counsel was ineffective for failing to object.

Even assuming this issue was not forfeited, we cannot conclude the court reversibly erred in including the cautionary instruction. Defendant's challenge to the cautionary portion of CALCRIM No. 358 misconstrues the instruction's plain language. The cautionary language does not change the People's burden of proof nor provide that recorded statements should be automatically accepted as accurate or credible. To the contrary, the unchallenged portion of CALCRIM No. 358 expressly instructs the jury that it "heard evidence that the defendant made oral or written statements before the trial," and the jury "must decide whether the defendant made any of these statements, in whole or in part." Additionally, it states: "If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements." (CALCRIM No. 358.) Nothing in the cautionary language, nor any other part of CALCRIM No. 358, could be reasonably interpreted to mean the jury should uncritically accept recorded statements by defendant as true. Accordingly, we cannot conclude it was reasonably probable defendant would have achieved a more favorable result if CALCRIM No. 358 had not been given. (See *People v. Dickey* (2005) 35 Cal.4th 894, 905–906.)

Furthermore, the bench notes for CALCRIM No. 358 instruct the court: "Give the bracketed cautionary instruction on request if there is evidence of an incriminating out-of-court oral statement made by the defendant." Here, Deputy Almanza testified defendant told him, in an unrecorded statement, that defendant was in good standing with the Southside Bakers gang. According to Almanza, defendant noted he is considered a dropout of the gang when he is in custody, but he remained active when he was on the streets. Defendant, however, testified he was no longer a member of the Southside Bakers. In a separate recorded statement with police, he also stated he had dropped out

of the gang. Given defendant's unrecorded inculpatory statement, the trial court did not err by instructing the jury to review defendant's unrecorded oral statement with caution.

We reject defendant's fourth contention.

V. Exclusion of Verbal Provocation Pinpoint Instruction

Defendant next challenges the trial court's denial of his request for a pinpoint instruction regarding verbal provocation.

A. Relevant Factual Background

1. Defendant's request for verbal provocation instruction denied

Defendant asked the court to include a special instruction to the jury that "mere words can be sufficient to constitute adequate provocation provided they rose to the particular standard." Defense counsel argued that such an instruction was appropriate and "there is case authority that stands for that proposition." She argued it is a pinpoint instruction, and "the defense is permitted to ask for pinpoint instructions that go to the crux of the defense." The prosecutor responded that such an instruction "would tend to direct the jury in a particular way if [it] were included in the instructions themselves and lead them to a particular conclusion." He further argued the jury instructions were clear as is and "to add to them would tend to actually confuse" the jury.

The court declined to include the special instruction. It noted the requested instruction is "actually covered in the jury instruction," which "is a catch all for everything." The court stated it was "not restricting defense in any manner to argue what a reasonable person and the mere words with the other actions included." But it concluded, "to focus on the mere words in and of themselves without the context of everything else would distract the jury or confuse the jury."

2. Court instructed jury on provocation and heat of passion

The court instructed the jury regarding provocation, including CALCRIM Nos. 522 and 570. CALCRIM No. 522 provides: "Provocation may reduce a murder

from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide."

CALCRIM No. 570 instructs the jury in part:

> "The defendant killed someone because of a sudden quarrel or in the heat of passion if:
>
> "1. The defendant was provoked;
>
> "2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment;
>
> "AND
>
> "3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.
>
> "Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.
>
> "In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While *no specific type of provocation is required*, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time." (Italics added.)

3. Defense counsel argued in closing that words alone can be sufficient provocation

In her closing argument, defense counsel argued "[u]nder the law, provocation to satisfy the heat of passion can be verbal or physical." "Words alone under the law if there is sufficient cause for an average person to respond in a rash way without judgment is [*sic*] sufficient in this case." She argued Simental was physical with defendant and it "all happened very quickly." She asserted defendant responded to the moment: "[S]omeone is yelling at you, calling you a bitch, telling you they are going to kill you

after they pushed you several times." She submitted to the jury that the killing was voluntary manslaughter.

B. Standard of Review and Applicable Law

"A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) The jury must be instructed on general principles """closely and openly connected to the facts and that are necessary for the jury's understanding of the case,""" including those instructions that "pinpoint" a defense theory. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1021.) Specifically, a criminal defendant "is entitled to an instruction that focuses the jury's attention on facts relevant to its determination of the existence of reasonable doubt …." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1230.)

But where standard instructions fully and adequately advise the jury upon a particular issue, a pinpoint instruction on that point is properly refused. (See *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1144.) Pinpoint instructions are also not warranted when they are argumentative, for example when requested only to highlight particular evidence, because such instructions "'invite[] the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 886; see *People v. Hughes* (2002) 27 Cal.4th 287, 361.) Pinpoint instructions may also be refused if, among other reasons, the proposed instruction is duplicative or potentially confusing. (*People v. Hovarter*, *supra*, 44 Cal.4th at p. 1021.)

C. Analysis

Here, the standard manslaughter instructions given expressly provided "no specific type of provocation [was] required." Thus, they adequately covered the proposed pinpoint instruction and the requested instruction was unnecessary. Accordingly, the trial court did not err in rejecting the pinpoint instruction because it could confuse the jury. (E.g., *People v. Gutierrez*, *supra*, 28 Cal.4th at pp. 1144–1145 [concluding "it was not

error to refuse to specially instruct the jury that words themselves can constitute sufficient provocation" where "the standard manslaughter instructions given adequately covered the valid points in the proposed pinpoint manslaughter instructions"].)

Even if we were to determine the requested pinpoint instruction should have been given, we conclude the error was harmless, as nothing in the standard instructions given *precluded* the jury from finding verbal provocation to be adequate. (See *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1144.) Additionally, the jury knew from defense counsel's argument the defense theory that Simental's words and his conduct could constitute adequate provocation. (See *People v. Earp*, *supra*, 20 Cal.4th at p. 887 [concluding no prejudice from failure to give pinpoint instruction on third party culpability where jury was instructed prosecution had to prove defendant's guilt beyond a reasonable doubt and jury knew from defense counsel's argument defense theory that third party had committed crimes].) Thus, we cannot conclude defendant was prejudiced by the refusal to give the requested pinpoint instruction.

We reject defendant's fifth contention.

VI. Prior Prison Term Enhancement

Defendant next challenges the basis of the imposed prior prison term enhancement.

A. Procedural History

After the jury returned its verdict, defendant admitted his prior conviction and enhancements, all of which related to one offense under Penal Code section 460, subdivision (a). The following related exchange took place:

> "THE COURT: What is before the court, it's been communicated to me by [defense] counsel … that the defendant is willing to admit his priors at this time and enhancements at this time, which would be 667(e), 667(a), and 667.5(b). [¶] Is that correct …?
>
> "[DEFENSE COUNSEL]: That is correct, your honor. [¶] Each of those allegations all are constituted by one prior, which is the 460(a). And I

have reviewed the documentation from the Department of Corrections with my client, and at this point, he's prepared to waive the trial and admit the priors.

"THE COURT: The case number was BF142862A, that was on 8/15, 2012, correct?

"[DEFENSE COUNSEL]: Yes, your honor.

"THE COURT: Thank you. With that, sir, you have heard what we're going to do at this time. [¶] [I]s that what you want to do?

"THE DEFENDANT: Yes, sir."

The court advised defendant of his right to a bench trial, his right to subpoena and call witnesses, his right to challenge the evidence, and his right to remain silent. It further advised defendant he could speak to his counsel for advice at any point. Defendant confirmed he was giving up his right to be heard in a hearing and he was willing to admit the priors and enhancements in this case. He then admitted his prior conviction and the related enhancements:

"THE COURT: In this case, it's further alleged as to [defendant], said person was on or about August 15, 2012, in the Superior Court, County of Kern, case number B142862A [*sic*], State of California, convicted of a prior felony offense, to wit: Penal Code section 460(a), burglary, first degree, within the meaning of sub division [*sic*] (c) through (j) of the Penal Code, section 667 and sub division [*sic*] (a) through (e), sir, do you admit that?

"THE DEFENDANT: Yes, sir.

"THE COURT: Turning to alleged as to the defendant …, on or about August 15, 2012, in the Superior Court, County of Kern, case number BF142862A, State of California, convicted of a serious felony, within the meaning of Penal Code section 667(a), through Penal Code section 460(a), burglary, first degree, sir do you admit or deny?

"THE DEFENDANT: Yes, sir.

"THE COURT: Which one, admit, or deny?

"THE DEFENDANT: Admit.

> "THE COURT: Turning to the third situation. [¶] It's further alleged, defendant … served a separate term in state prison or federal prison for felony offense, to wit: Penal Code section 460(a), burglary first degree, on or about August 15, 2012, in the Superior Court, County of Kern, State of California, case number BF142862A, that [defendant] was released from prison custody and did commit an offense resulting in a felony conviction during a period within five years of such release, within the meaning of Penal Code section 667.5(b), do you admit or deny?
>
> "(Defendant speaking with his counsel.)
>
> "THE DEFENDANT: Yeah, I admit."

The court accepted defendant's admissions and found he "made a knowing, intelligent and voluntary waiver of his rights."

During the sentencing hearing, defense counsel argued the imposition of the prior prison enhancement pursuant to Penal Code section 667.5, subdivision (b) was "improper in this case." She noted that defendant received an additional eight-month sentence because a gun was stolen as a part of the residential burglary (Pen. Code, § 460, subd. (a)) in his prior case, case No. BF142862A. But, in this case, he only admitted the residential burglary prior, which formed the basis for both the section 667, subdivision (a) priors, as well as the section 667.5, subdivision (b) prior. She argued, "[S]ince [Penal Code section] 654 … should have applied [in case No. BF142862A] since the gun was part of the 460(a), I don't believe it's appropriate to impose it. I would ask the court to dismiss it pursuant to 1385, or just not impose it under 654."

Relying on the probation report and its citations to *People v. Brandon* (1995) 32 Cal.App.4th 1033 and *People v. Medina* (1988) 206 Cal.App.3d 986, the prosecutor argued, "Even though that gun from a prior case was stolen during the 460(a), he was sentenced consecutively in that case. And therefore, … both the 667(a) and the 667.5(b) prior are still in effect."

The court rejected the challenge to the prison prior enhancement and sentenced defendant "to the Department of Corrections for the term prescribed by law of 30 years to

life," "enhanced by one year pursuant to section 12022 Subdivision (b) Subdivision (1) of the Penal Code, enhanced by five years pursuant to Section 667 Subdivision (a) of the Penal Code. Said sentence to be enhanced by one year pursuant to Section 667.5 Subdivision (b) of the Penal Code, for a total fixed term of 30 years to life, plus seven years."

B. Analysis

Defendant contends he only admitted one prior conviction—first degree burglary—the only conviction alleged in the information. However, the probation report recommended, and the trial court imposed, separate terms for a prior serious felony enhancement and a prior prison enhancement. Citing *People v. Jones* (1993) 5 Cal.4th 1142, defendant argues "the same conviction and commitment cannot support separate terms for a prior serious felony enhancement (Pen. Code, § 667, subd. (a)) and the resultant prior prison term enhancement (Pen. Code, § 667.5)." The People agree and concede that our court should strike the one-year prison prior enhancement (§ 667.5, subd. (a)) and "issue a modified abstract of judgment."

In *Jones*, the California Supreme Court concluded the defendant's prior conviction for an aggravated form of kidnapping could not serve as the basis for both a prior serious felony enhancement and a prior prison enhancement. (*People v. Jones*, *supra*, 5 Cal.4th at p. 1153.) It held "when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, *but only that one,* will apply." (*Id.* at p. 1150, italics added.) The Supreme Court remanded the case to the trial court and directed it to strike the one-year enhancement of defendant's sentence for his prior offense of kidnapping under Penal Code section 667.5, subdivision (b), and to modify the abstract of the judgment accordingly. (*Jones,* at p. 1153.)

We agree with the parties' contention that the record reflects defendant admitted only one prior conviction for first degree burglary from case No. BF142862A. As the Supreme Court held in *People v. Jones*, this single conviction cannot support separate terms for a prior serious felony enhancement (Pen. Code, § 667, subd. (a)) and a prior prison term enhancement. Accordingly, we will modify the sentence by vacating the prior prison term enhancement.

DISPOSITION

The judgment is modified as follows: The one-year prior prison term enhancement imposed pursuant to Penal Code section 667.5, subdivision (b) is vacated. The trial court is directed to prepare an amended abstract of judgment to reflect this modification and to submit a certified copy of same to the Department of Corrections and Rehabilitation. As so modified, and in all other respects, the judgment is affirmed.

_____
PEÑA, J.

WE CONCUR:

_____
DETJEN, Acting P.J.

_____
SNAUFFER, J.